

**IN THE COURT OF COMMON PLEAS, MONTGOMERY COUNTY, PENNSYLVANIA**

International Union of Operating Engineers :  
 Local 542 :

v. :

NO. 2018-14059

Mallinckrodt Ard, Inc. f/k/a Questcor :  
 Pharmaceuticals, Inc.; Mallinckrodt PLC; Express :  
 Scripts Holding Company; Express Scripts, Inc.; :  
 CuraScript, Inc.; CuraScript SD; Accredo Health :  
 Group, Inc. and United BioSource Corporation n/k/a: :  
 United BioSource LLC, a wholly owned subsidiary :  
 of United BioSource Holdings, Inc. :

**ORDER**

**AND NOW**, this                      day of                      , 2019, upon consideration of Plaintiff's Motion to Compel Depositions, and any Responses thereto, it is hereby ORDERED and DECREED that:

1. Plaintiff's Motion to Compel, ECF No. 169, is **DENIED**.
2. Express Scripts' Motion for a Protective Order, ECF No. 167, setting the places of deposition for Mr. Osborne and Mr. Grew, in accordance with the Proposed Order attached to Express Scripts' Motion for Protective Order, is **GRANTED**.

**BY THE COURT:**

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J.

**IN THE COURT OF COMMON PLEAS, MONTGOMERY COUNTY, PENNSYLVANIA**

International Union of Operating Engineers  
Local 542,

v.

Mallinckrodt ARD, Inc. f/k/a Questcor  
Pharmaceuticals, Inc.; Mallinckrodt PLC;  
Express Scripts Holding Company; Express  
Scripts, Inc.; CuraScript, Inc.; CuraScript SD;  
Accredo Health Group, Inc. and United  
BioSource Corporation n/k/a United  
BioSource LLC, a wholly owned subsidiary of  
United BioSource Holdings, Inc.

NO. 2018-14059

**DEFENDANT EXPRESS SCRIPTS' RESPONSE TO  
PLAINTIFF'S MOTION TO COMPEL DISCOVERY**

Defendants Express Scripts Holding Company, Express Scripts, Inc., CuraScript, Inc.,  
CuraScript SD, Accredo Health Group, Inc. and United BioSource Corporation (collectively,  
"Express Scripts"), by its undersigned counsel, hereby respond to Plaintiff International Union of  
Operating Engineers Local 542's Motion to Compel Discovery, ECF No. 169, as follows:

1. Admitted.

2. Express Scripts has no knowledge regarding this statement, which is not supported  
by any citation. Therefore, it is denied.

3. Express Scripts admits that counsel for Express Scripts informed Plaintiff's counsel  
that Mr. Osborne was not available for the noticed deposition on July 17, 2019.

4. Express Scripts admits that, in response to Express Scripts' email regarding Mr.  
Osborne's availability, Plaintiff's counsel stated: "Evan, he is [available]. We know he is  
in Philadelphia next week. That you waited until now to say he is not is likely sanctionable.  
If you don't agree to produce him as noticed, we will file an emergency Motion with the  
Court." Express Scripts further responds that it later informed Plaintiff's Counsel:

You unilaterally noticed Mr. Osborne for deposition on July 24, 2019. You  
did so without asking about or conferring with Express Scripts regarding Mr.  
Osborne's availability. Had you done so, Express Scripts would have  
confirmed that Mr. Osborne was not available for deposition in Philadelphia  
on July 24. As you are aware, Mr. Osborne resides in Orlando, Florida, not

1 Philadelphia, Pennsylvania. He happened to be in Philadelphia July 22 for  
2 what even you concede was an entirely “unrelated” professional obligation—  
3 namely, the World Congress’ 6th Annual Patient Support Services and HUB  
4 Design Summit. Mr. Osborne spoke at the first panel, on the first day of the  
5 conference. It lasted one hour. After that panel concluded, Mr. Osborne  
6 headed to the airport, where he boarded a flight to San Francisco for work  
7 meetings from Tuesday, July 22 through Thursday, July 24. Mr. Osborne  
8 was not, therefore, available for deposition on the date you noticed and  
9 counsel for Express Scripts properly notified you of the same. That said, we  
10 are willing to meet and confer with you to find a mutually agreeable date and  
11 location for Mr. Osborne’s deposition, consistent with our proposal discussed  
12 in greater detail below.”

13 Pl. Ex. F. Express Scripts otherwise denies this paragraph.

14 5. Express Scripts admits that local counsel, Mr. Joseph Walsh, responded as reflected  
15 in Exhibit D. Express Scripts otherwise denies Plaintiff’s characterization of the  
16 correspondence.

17 6. Denied. Mr. Osborne was not scheduled to be in Philadelphia on July 24th, the date  
18 Plaintiff noticed his deposition. Rather, he was in Philadelphia on July 22 for a professional  
19 obligation at the World Congress’ 6<sup>th</sup> Annual Patient Support Services and HUB Design  
20 Summit, where Mr. Osborne spoke on the first panel. As Express Scripts informed  
21 Plaintiff’s Counsel, Mr. Osborne left the conference after his appearance on the panel, in  
22 order to make a flight to San Francisco, CA where he had meetings scheduled on July 23rd  
23 and July 24th. *See* Pl. Ex. F. Plaintiff’s counsel never conferred with Express Scripts about  
24 Mr. Osborne’s availability before serving its notice. Had he done so, Express Scripts would  
25 have informed him that Mr. Osborne was not available on the July 24th.

26 7. Express Scripts admits that a deposition of a witness from United BioSource took  
27 place at the Montgomery County Courthouse on June 13, 2019. Express Scripts otherwise  
28 denies this paragraph.

8. Denied. Express Scripts did not “refuse to appear.” Rather, Plaintiff’s counsel  
agreed on July 18th that Mr. Osborne’s July 24th deposition would be rescheduled, obviating  
any need for Express Scripts to seek a protective order or otherwise appear for the noticed  
deposition. *See* Pl. Ex. D at 1 (asking Express Scripts to provide alternative dates for Mr.  
Osborne’s deposition).

1           9.       Denied. Plaintiff's counsel agreed on July 18th that Mr. Osborne's July 24th  
2 deposition would be rescheduled, obviating any need for Mr. Osborne to appear for  
3 deposition or for Express Scripts to seek a protective order. *See* Pl. Ex. D at 1 (asking  
4 Express Scripts to provide alternative dates for Mr. Osborne's deposition).

5           10.     Admitted. Express Scripts further states that Exhibit D reflects Plaintiff's counsel's  
6 agreement to reschedule Mr. Osborne's July 24th deposition for a later date.

7           11.     Denied. As to the first sentence, Express Scripts expressly stated that the parties  
8 would have to "meet and confer to find a mutually agreeable date *and location* for Mr.  
9 Osborne's deposition," preserving its right to object to any location proposed through the  
10 meet and confer process. Pl. Ex. D at 2 (emphasis added). As to the second sentence,  
11 Plaintiff's counsel agreed on July 18th that Mr. Osborne's July 24th deposition would be  
12 rescheduled, obviating any need for Express Scripts to seek a protective order at that time.  
13 *See* Pl. Ex. D at 1 (asking Express Scripts to provide alternative dates for Mr. Osborne's  
14 deposition). Express Scripts did not, therefore, waive any objection to Mr. Osborne's  
15 deposition.

16           12.     Admitted.

17           13.     Admitted.

18           14.     Express Scripts admits that it has not contested the relevancy of Mr. Osborne's  
19 deposition, and that it has listed Mr. Osborne as a relevant witness in its discovery responses  
20 in this case. Express Scripts otherwise denies this paragraph.

21           15.     Denied. Express Scripts provided Plaintiff's counsel with several dates for Mr.  
22 Osborne's deposition, including October 9, 10, 16, 17, 23, 24 and 30. *See* Pl. Ex. H.

23           16.     Express Scripts admits that on August 7, 2019, Plaintiff wrote to Express Scripts  
24 seeking dates for Mr. Osborne's deposition. In all other respects, this paragraph is denied.

25           17.     Express Scripts admits that on August 9, 2019, it sent Plaintiff's counsel a letter that  
26 stated, in relevant part:

27                   At the outset, we will set the record straight regarding Mr. Osborne's  
28                   deposition. You unilaterally noticed Mr. Osborne for deposition on July 24,  
                    2019. You did so without asking about or conferring with Express Scripts

1 regarding Mr. Osborne's availability. Had you done so, Express Scripts  
2 would have confirmed that Mr. Osborne was not available for deposition in  
3 Philadelphia on July 24. As you are aware, Mr. Osborne resides in Orlando,  
4 Florida, not Philadelphia, Pennsylvania. He happened to be in Philadelphia  
5 July 22 for what even you concede was an entirely "unrelated" professional  
6 obligation—namely, the World Congress' 6th Annual Patient Support  
7 Services and HUB Design Summit. Mr. Osborne spoke at the first panel, on  
8 the first day of the conference. It lasted one hour. After that panel concluded,  
9 Mr. Osborne headed to the airport, where he boarded a flight to San Francisco  
10 for work meetings from Tuesday, July 22 through Thursday, July 24. Mr.  
11 Osborne was not, therefore, available for deposition on the date you noticed  
12 and counsel for Express Scripts properly notified you of the same. That said,  
13 we are willing to meet and confer with you to find a mutually agreeable date  
14 and location for Mr. Osborne's deposition, consistent with our proposal  
15 discussed in greater detail below.

16 Pl. Ex. F. Express Scripts otherwise denies this paragraph.

17 18. Denied. Express Scripts contacted Plaintiff's counsel on July 17 and July 18, and  
18 sought to "meet and confer to find a mutually agreeable date and location for Mr. Osborne's  
19 deposition." Pl. Ex. D at 2. As Express Scripts explained to Plaintiff's counsel, Mr. Osborne  
20 was not able to schedule a deposition around his July 22nd trip to Philadelphia because he  
21 had meetings scheduled in San Francisco on the evening of July 22nd, as well as on July  
22 23rd and July 24th. See Pl. Ex. F. Express Scripts further responds that it was Plaintiff's  
23 counsel who failed to coordinate Mr. Osborne's deposition, not counsel for Express Scripts.

24 19. Express Scripts admits it did not seek a protective order regarding Mr. Osborne's  
25 deposition, because no such order was necessary, due to Plaintiff's counsel's agreement on  
26 July 18th to reschedule Mr. Osborne's deposition.

27 20. Admitted.

28 21. Express Scripts admits that it agreed during a meet and confer to provide dates for  
Mr. Osborne's deposition. Plaintiff's counsel did not raise, and the parties did not discuss,  
the location of the deposition.

22. Express Scripts admits it sent Plaintiff's Exhibit H to Plaintiff's counsel on August  
21, 2019. Express Scripts otherwise denies Plaintiff's characterization of the  
correspondence reflected in paragraph 22.

23. Express Scripts admits that, following a meet and confer in which it agreed to provide  
dates for Mr. Osborne's deposition, on August 21, 2019, it provided several dates in October

1 for the deposition, as reflected in Plaintiff's Exhibit H. The parties had not discussed a  
2 location for the deposition and Express Scripts never agreed to waive or otherwise withdraw  
3 its objection to the location of the deposition. Express Scripts otherwise denies Plaintiff's  
4 characterization of the correspondence and facts reflected in paragraph 23.

5 24. Express Scripts admits that, in response to its August 21, 2019 email, Plaintiff's  
6 counsel stated: "the below does not resolve anything, but a **date** for Mr. Osborne's  
7 deposition." (emphasis added). In all other respects this paragraph is denied. As Plaintiff's  
8 counsel's email confirms, the only issue that had been "resolved" was "a **date** for Mr.  
9 Osborne's deposition." No agreement had been reached as to the location of the deposition,  
10 and there is nothing in any communication to suggest that such an agreement was reached.

11 25. Admitted. Express Scripts further responds that Plaintiff failed to meet and confer  
12 or otherwise coordinate with Express Scripts regarding Mr. Grew's deposition prior to  
13 serving the deposition notice reflected at Plaintiff's Exhibit J.

14 26. Admitted.

15 27. Express Scripts admits that the quoted language is accurate. In all other respects,  
16 this paragraph is denied. Express Script's email was not "false." On September 17, 2019,  
17 Plaintiff noticed for the first time the deposition of Paul Grew for October 24, 2019 in  
18 Philadelphia. The parties had not previously discussed any deposition of Mr. Grew, and had  
19 not met and conferred regarding the date, location or time for his deposition. That same day,  
20 Plaintiff's counsel re-noticed the deposition of Mr. Osborne in Philadelphia. The parties had  
21 not met and conferred regarding the location for Mr. Osborne's deposition. Express Scripts  
22 further denies Plaintiff's claim that this was the "first time" that Express Scripts' refused to  
23 produce witnesses for deposition in Philadelphia. As reflected in Plaintiff's Exhibit D at 2,  
24 Express Scripts had notified Plaintiff's months prior, on July 18, 2019, that it objected to the  
25 location of Plaintiff's noticed depositions.

26 28. Admitted.

27 29. Express Scripts admits that the parties met and conferred on September 30, 2019,  
28 and that Express Scripts attorney Joe Walsh was unavailable for the meet and confer.

1 Express Scripts denies the implication that Mr. Walsh's absence in any way hampered the  
2 meet and confer. Express Scripts further responds that Mr. Walsh's commitment to work  
3 "amicably" with Plaintiff's counsel regarding depositions was a commitment on behalf of  
4 all counsel for Express Scripts and, as evidenced by the voluminous correspondence attached  
5 by Plaintiff, Express Scripts has been trying (and continues to try) to work amicably with  
6 Plaintiff's counsel to resolve this issue. The same cannot be said for Plaintiff's counsel.

7 30. Express Scripts admits that Quinn Emanuel serves as counsel for Express Scripts.  
8 Express Scripts further admits that, during the September 30, 2019 meet and confer, Express  
9 Scripts' counsel told Plaintiff's counsel that Mr. Osborne would be available for deposition  
10 on October 23, 2019 in Florida, and that Mr. Grew would be available for deposition on  
11 October 24, 2019 in Buffalo. Express Scripts otherwise denies Plaintiff's characterization  
12 of the facts as reflected in paragraph 30.

13 31. Express Scripts admits that, during the September 30, 2019 meet and confer,  
14 Plaintiff's counsel took the position that he would not accept a deposition location more than  
15 100 miles from the Montgomery County Courthouse. Express Scripts denies that it "never  
16 timely objected" to the location of Mr. Osborne's or Mr. Grew's deposition. Express Scripts  
17 further responds that at no time during the parties' meet and confer (or any time prior to this  
18 filing) did Plaintiff's counsel claim that Express Scripts had "never timely objected" to the  
19 location of either Mr. Osborne or Mr. Grew's deposition. As to Mr. Osborne, Express  
20 Scripts expressly stated in its communications with counsel back in July that the parties  
21 would have to "meet and confer to find a mutually agreeable date *and location* for Mr.  
22 Osborne's deposition," preserving its right to object to any location proposed through the  
23 meet and confer process. Pl. Ex. D at 2 (emphasis added). As to Mr. Grew, less than 10  
24 days after receiving the deposition notice, Express Scripts sent Plaintiff's counsel an email  
25 that specifically objected to Philadelphia as the location for the deposition. Pl. Ex. K.

26 32. Express Scripts admits that during the September 30, 2019 meet and confer,  
27 Plaintiff's counsel asked Express Scripts' counsel when Mr. Grew would next be in  
28



1 Philadelphia. Express Scripts responded that it would have to confer with Mr. Grew before  
2 providing a response.

3 33. Express Scripts admits that during the September 30, 2019 meet and confer,  
4 Plaintiff's counsel asked Express Scripts' counsel when Mr. Grew would next be in  
5 Philadelphia. Express Scripts responded that it would have to confer with Mr. Grew before  
6 providing a response. Express Scripts otherwise denies paragraph 33.

7 34. Express Scripts admits that Plaintiff's counsel asked whether or not Express Scripts  
8 would agree to pay Plaintiff's counsel's expenses and attorneys' fees for taking the  
9 depositions in alternative locations.

10 35. Express Scripts admits that, during the September 30, 2019 meet and confer, Express  
11 Script's counsel told Plaintiff's counsel they would discuss Plaintiff's counsel's request for  
12 expenses and attorney's fees with the client.

13 36. Admitted.

14 37. Admitted.

15 38. Express Scripts has no knowledge regarding this statement, which is neither  
16 supported by any citation nor previously disclosed by Plaintiff. Therefore, it is denied.  
17 Express Scripts further responds that Plaintiff's counsel's effort to speak with, or have his  
18 client speak with, Mr. Grew regarding *any* aspect of the pending Acthar litigation is  
19 improper and a violation of 204 Pa. Code Rule 4.2. Mr. Grew is an employee of Express  
20 Scripts and represented by counsel (Quinn Emanuel) in this matter and all related Acthar  
21 litigations. All communications regarding those cases, including any effort by Plaintiff to  
22 schedule a deposition of Mr. Grew or any other employee of Express Scripts, must go  
23 through counsel and counsel alone. Express Scripts reserves all right to seek appropriate  
24 relief, including sanctions, for Plaintiff's counsel's conduct.

25 39. Admitted.

26 40. Admitted.

27 41. Denied. No agreement was ever reached regarding the location of Mr. Osborne's  
28 deposition. Plaintiff has not identified any document suggesting that such an agreement was



1 reached. To the contrary, Plaintiff's counsel's last communication on the subject was that  
2 "the below does not resolve anything, **but a date** for Mr. Osborne's deposition." Pl. Ex. I  
3 (emphasis added). Express Scripts further responds that Plaintiff's counsel has filed related  
4 litigation with overlapping claims against the same parties in federal and state courts inside  
5 and outside of Pennsylvania, including in Illinois, Maryland, and Tennessee. Plaintiff's  
6 counsel has appeared for hearings, filed motions, and conducted discovery in these out-of-  
7 state jurisdictions, and the parties have agreed to the use and coordination of discovery and  
8 depositions across cases. *City of Rockford v. Mallinckrodt ARD, Inc.*, Civ. No. 17-cv-50107  
9 (N.D. Ill.), Mar. 15, 2019 Joint Proposed Discovery Plan at 4-5, ECF No. 199 ("To the extent  
10 feasible, the parties will endeavor to ensure that witnesses deposed in the above-captioned  
11 matters will not be deposed a second time in a Related Matter, or vice versa."); *id.* at Sept.  
12 20, 2019 Status Hr'g Tr. at 6, ECF No. 273 (Plaintiff's counsel stating that "we certainly  
13 want to coordinate the effort in Philadelphia with this court"). In fact, discovery in this case  
14 already has—and likely will continue to be—used in cases throughout the United States in  
15 forums that Plaintiff's counsel has purposefully availed itself of in order to bring this case  
16 and others. *See* ECF No. 167 at 3. Given Plaintiff's counsel's choice to file related litigation  
17 in multiple other jurisdictions, it is not unreasonable to ask that Plaintiff's counsel take  
18 depositions outside of Pennsylvania.

19 42. Denied. Express Scripts further responds that, far from "delay, avoid and obstruct"  
20 discovery in this case, Express Scripts has produced over 217,000 documents, the relevant  
21 contracts at issue, and has offered time and time again to work with Plaintiff's counsel to  
22 reach an amicable resolution on this and other discovery disputes. If there is a delay in  
23 discovery—which Express Scripts denies—it is a result of Plaintiff's actions alone.

24 43. Admitted. Express Scripts further responds that it has, in fact, complied with those  
25 discovery orders.

26 44. Express Scripts admits that it replaced prior counsel, Drinker Biddle & Reath, LLP  
27 and Skadden Arps, with its current counsel, Quinn Emanuel. Express Scripts otherwise  
28 denies Plaintiff's characterization of the facts contained in paragraph 44.

1           45. Express Scripts admits that Plaintiff's Exhibit N is a copy of *In re Interest Rate Swaps*  
2           *Antitrust Litig.*, 2018 U.S.Dist. LEXIS 86732 (S.D.N.Y. May 23, 2018) at \*81-95. Express  
3           Scripts otherwise denies Plaintiff's characterization of the decision.

4           46. Express Scripts admits that Plaintiff's Exhibit N is a copy of *In re Interest Rate Swaps*  
5           *Antitrust Litig.*, 2018 U.S.Dist. LEXIS 86732 (S.D.N.Y. May 23, 2018) at \*81-95. Express  
6           Scripts otherwise denies Plaintiff's characterization of the decision.

7           47. Express Scripts admits that Plaintiff's Exhibit N is a copy of *In re Interest Rate Swaps*  
8           *Antitrust Litig.*, 2018 U.S.Dist. LEXIS 86732 (S.D.N.Y. May 23, 2018) at \*81-95. Express  
9           Scripts otherwise denies Plaintiff's characterization of the decision.

10          48. Denied.

11          WHEREFORE, Express Scripts respectfully requests that the Court deny Plaintiff's Motion  
12          to Compel, ECF No. 169, and grant Express Scripts' Motion for a Protective Order, ECF No. 167,  
13          setting the places of deposition for Mr. Osborne and Mr. Grew in accordance with the proposed  
14          Protective Order attached to Express Scripts' motion.

1 DATED: October 18, 2019

Respectfully submitted,

2 /s/ Joseph P. Walsh

3 Joseph P. Walsh, Esq.

4 I.D. No. 64352

5 **WALSH PANCIO, LLC**

6 2028 North Broad Street

7 Lansdale, PA 19446-1004

8 Tel: (215) 368-8660

9 Fax: (215) 368-7990

10 joe@walshpancio.com

11 Michael J. Lyle, Esq. (*pro hac vice*)

12 Eric C. Lyttle, Esq. (*pro hac vice*)

13 Ethan C. Glass, Esq. (*pro hac vice*)

14 Meghan A. McCaffrey, Esq. (*pro hac vice*)

15 Michael D. Bonanno, Esq. (*pro hac vice*)

16 **QUINN EMANUEL URQUHART & SULLIVAN, LLP**

17 1300 I Street, NW

18 Washington, DC 20005

19 Tel: (202) 538-8000

20 Fax: (202) 538-8100

21 mikelyle@quinnemanuel.com

22 ericlyttle@quinnemanuel.com

23 ethanglass@quinnemanuel.com

24 megghanmccaffrey@quinnemanuel.com

25 mikebonanno@quinnemanuel.com

26 ***Counsel for Defendants Express Scripts Holding***  
27 ***Company, Express Scripts, Inc., CuraScript, Inc.,***  
28 ***CuraScript SD, Accredo Health Group, Inc. and***  
***United BioSource Corporation***

**IN THE COURT OF COMMON PLEAS, MONTGOMERY COUNTY, PENNSYLVANIA**

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Mallinckrodt Ard, Inc. f/k/a Questcor	:	
Pharmaceuticals, Inc.; Mallinckrodt PLC; Express	:	
Scripts Holding Company; Express Scripts, Inc.;	:	
CuraScript, Inc.; CuraScript SD; Accredo Health	:	
Group, Inc. and United BioSource Corporation n/k/a:	:	
United BioSource LLC, a wholly owned subsidiary	:	
of United BioSource Holdings, Inc.	:	

**CERTIFICATION OF SERVICE**

I, Joseph P. Walsh, Esquire, Co-Counsel for Defendants, *Express Scripts Holding Company, Express Scripts, Inc., CuraScript, Inc., CuraScript SD, Accredo Health Group, Inc. and United BioSource Corporation n/k/a United BioSource, LLC*, do hereby certify that a true and correct copy of *Defendants' Response to Plaintiff's Motion to Compel Depositions, Proposed Order and Memorandum of Law*, were served upon the following counsel and unrepresented parties electronically by the E-Filing System or by facsimile or United States First Class Mail if counsel or the unrepresented party does not participate in E-Filing, on the date of the E-filing acceptance of the document.

***Attorneys for Plaintiff:***

Donald E. Haviland, Jr., Esquire  
 William H. Platt, II, Esquire  
*Haviland Hughes*  
 201 South Maple Way, Suite 110  
 Ambler, PA 19002  
[haviland@havilandhughes.com](mailto:haviland@havilandhughes.com)  
[platt@havilandhughes.com](mailto:platt@havilandhughes.com)

***Attorneys and Pro Hac Vice Attorneys for Mallinckrodt Defendants:***

Daniel T. Sherry, Esquire  
Wendy J. Bracaglia, Esquire  
*Marshall, Dennehey, Warner, Coleman & Goggin*  
620 Freedom Business Center  
Suite 300  
King of Prussia, PA 19406  
[djsherry@mdwecg.com](mailto:djsherry@mdwecg.com)  
[wjbracaglia@mdwecg.com](mailto:wjbracaglia@mdwecg.com)

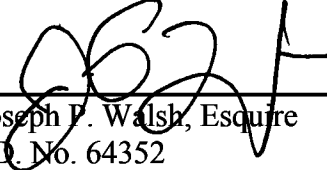
Sonia K. Pfaffenroth, Esq.  
Adam Pergament, Esq.  
Laura Shores, Esq.  
Ryan Z. Watts, Esq.  
Matthew M. Wolf, Esq.  
*Arnold & Porter LLP*  
601 Massachusetts Avenue NW  
Washington, DC 20001  
[sonia.pfaffenroth@arnoldporter.com](mailto:sonia.pfaffenroth@arnoldporter.com)  
[adam.pergament@arnoldporter.com](mailto:adam.pergament@arnoldporter.com)  
[laura.shores@arnoldporter.com](mailto:laura.shores@arnoldporter.com)  
[ryan.watts@arnoldporter.com](mailto:ryan.watts@arnoldporter.com)  
[matthew.wolf@arnoldporter.com](mailto:matthew.wolf@arnoldporter.com)

***Co-Attorneys for Defs. Express Scripts Holding Company, Express Scripts, Inc., CuraScript, Inc, CuraScript SD, Accredo Health Group, Inc. and United BioSource Corporation n/k/a United BioSource, LLC:***

Eric Lyttle, Esq.  
Ethan Glass, Esq.  
Meghan McCaffrey, Esq.  
Michael Lyle, Esq.  
Michael Bonanno, Esq.  
*Quinn Emanuel Urquhart & Sullivan LLP*  
1300 I Street NW  
Suite 900  
Washington, DC 20005  
[ericlyttle@quinnemanuel.com](mailto:ericlyttle@quinnemanuel.com)  
[ethanglass@quinnemanuel.com](mailto:ethanglass@quinnemanuel.com)  
[meghanmccaffrey@quinnemanuel.com](mailto:meghanmccaffrey@quinnemanuel.com)  
[mikelyle@quinnemanuel.com](mailto:mikelyle@quinnemanuel.com)  
[mikebonanno@quinnemanuel.com](mailto:mikebonanno@quinnemanuel.com)

WALSH PANCIO, LLC

BY: \_\_\_\_\_

  
Joseph P. Walsh, Esquire  
I.D. No. 64352

***Co-Attorney for Defendants, Express Scripts Holding Company, Express Scripts, Inc., CuraScript, Inc, CuraScript SD, Accredo Health Group, Inc. and United BioSource Corporation n/k/a United BioSource, LLC***

2028 North Broad Street  
Lansdale, PA 19446-1004  
(215) 368-8660; fax: (215) 368-7990  
[joe@walshpancio.com](mailto:joe@walshpancio.com)

10.18.19

**IN THE COURT OF COMMON PLEAS, MONTGOMERY COUNTY, PENNSYLVANIA**

International Union of Operating Engineers  
Local 542,

v.

Mallinckrodt ARD, Inc. f/k/a Questcor  
Pharmaceuticals, Inc.; Mallinckrodt PLC;  
Express Scripts Holding Company; Express  
Scripts, Inc.; CuraScript, Inc.; CuraScript SD;  
Accredo Health Group, Inc. and United  
BioSource Corporation n/k/a United  
BioSource LLC, a wholly owned subsidiary of  
United BioSource Holdings, Inc.

NO. 2018-14059

**DEFENDANT EXPRESS SCRIPTS' MEMORANDUM OF LAW**  
**IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL DISCOVERY**

Defendants Express Scripts Holding Company, Express Scripts, Inc., CuraScript, Inc., CuraScript SD, Accredo Health Group, Inc. and United BioSource Corporation (collectively, "Express Scripts"), by its undersigned counsel, respectfully submit this opposition to Plaintiff International Union of Operating Engineers Local 542's Motion to Compel Discovery, ECF No. 169, which seeks to compel the depositions of two Express Scripts employees, Rob Osborne and Paul Grew. There is only one issue on which the parties have failed to reach an agreement with respect to these depositions, and that is the location. Mr. Osborne lives and works in Orlando, Florida, and Mr. Grew lives and works in Buffalo, New York. Plaintiff has nonetheless insisted on holding both depositions in Philadelphia. As Express Scripts explains in its separate Motion for a Protective Order, ECF No. 167, requiring Mr. Osborne and Mr. Grew to travel to Philadelphia for their depositions would create unreasonable annoyance, burden and expense, warranting the entry of a protective order. Plaintiff's motion, which seeks to compel Mr. Osborne and Mr. Grew to appear for deposition in Philadelphia, should be denied for the same reasons.

In its motion, Plaintiff mischaracterizes the record, arguing that Express Scripts waived any objection to the location of Mr. Osborne's deposition by failing to file a protective order before July 24th, 2019, the date on the original deposition notice. But Plaintiff's counsel *agreed to reschedule the deposition*, obviating any need for Express Scripts to seek a protective order at that time.



1 Plaintiff also claims, inexplicably, that Express Scripts agreed to hold the deposition in Philadelphia  
 2 but later attempted to “undue [sic]” the agreement. Pl. Br. ¶¶ 41, 45. Not so. Express Scripts  
 3 insisted that the parties “meet and confer to find a mutually agreeable date *and location* for Mr.  
 4 Osborne’s deposition,” Pl. Ex. D at 2 (emphasis added), which Plaintiff’s counsel never did. Instead,  
 5 he re-noticed Mr. Osborne’s deposition for Philadelphia without consulting with Express Scripts on  
 6 the location.

7 Express Scripts has properly moved for a protective order, and has demonstrated “good  
 8 cause” for the entry of such an order. That motion should be granted, and Plaintiff’s Motion to  
 9 Compel should be denied.

# 10 I. FACTUAL AND PROCEDURAL BACKGROUND

11 On June 26, 2019, Plaintiff unilaterally noticed Mr. Osborne’s deposition for July 24, 2019  
 12 in Philadelphia, without conferring with Express Scripts about his availability. *See* Pl. Ex. A. Mr.  
 13 Osborne had prior commitments on the 24th.<sup>1</sup> On July 17, 2019, Express Scripts informed Plaintiff  
 14 that Mr. Osborne was not available on the noticed date, and offered to work with Mr. Osborne to  
 15 find alternative dates. *See* Pl. Ex. B.

16 Instead of agreeing to coordinate to find a mutually agreeable date, Plaintiff’s counsel  
 17 asserted that any attempt to reschedule the deposition was “likely sanctionable,” and threatened to  
 18 file an “emergency motion with the court.” Pl. Ex. C. In response, Express Scripts reminded  
 19 Plaintiff’s counsel that he had “noticed Mr. Osborne’s deposition for July 24th without asking about  
 20 or conferring with Express Scripts,” and reiterated that Express Scripts was willing to “meet and  
 21 confer to find a mutually agreeable date *and location* for Mr. Osborne’s deposition that works for  
 22 all parties.” Pl. Ex. D at 2 (emphasis added). Plaintiff’s counsel responded on July 18th requesting  
 23 that Express Scripts provide new dates for Mr. Osborne’s deposition “in the near future.” Pl. Ex. D  
 24 at 1. Thus, the July 24th deposition was cancelled by agreement on July 18th. The suggestion in  
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 27 <sup>1</sup> In its brief, Plaintiff claims that it “noticed Mr. Osborne’s deposition for a date [July 24th]  
 28 when it knew Mr. Osborne would be in Philadelphia, as a convenience to the witness . . .” (Pl. Br.  
 ¶6.) In fact, however, Mr. Osborne had meetings scheduled in San Francisco on July 24th, as  
 Express Scripts explained in its communications with Plaintiff’s counsel. (*See* Pl. Ex. F.)

1 Plaintiff's brief that Mr. Osborne simply failed to appear, and that Express Scripts failed to timely  
2 file a protective order, is incorrect. *See* Pl. Br. ¶¶ 8-9, 11.

3       Between August 7, 2019 and August 21, 2019, the parties exchanged several additional  
4 communications regarding Mr. Osborne's deposition. *See* Pl. Exs. E, F, H. In those  
5 communications, Express Scripts reiterated that "Mr. Osborne resides in Orlando, Florida, not  
6 Philadelphia, Pennsylvania." Pl. Ex. F at 1. Express Scripts further stated that it would only make  
7 Mr. Osborne available for deposition once. *Id.* at 2. Thus, Express Scripts explained, if Mr. Osborne  
8 is deposed before a coordinated discovery plan is adopted for the numerous cases counsel has filed  
9 across multiple jurisdictions, Express Scripts would not produce Mr. Osborne again in those other  
10 cases. *Id.* Subject to that restriction, Express Scripts proposed several dates for Mr. Osborne's  
11 deposition, including October 9, 10, 16, 17, 23, 24 and 30. *See* Pl. Ex. H. The parties did not  
12 discuss a location for the deposition.

13       Over a month later, on September 17, 2019, without having further conferred with Express  
14 Scripts, Plaintiff unilaterally served an amended notice of deposition for Mr. Osborne for October  
15 23, 2019, again setting the location for the deposition as Philadelphia. Pl. Ex. J. The same day,  
16 Plaintiff noticed for the first time the deposition of Paul Grew for October 24, 2019, also in  
17 Philadelphia. *Id.* The parties had not previously discussed any deposition of Mr. Grew.

18       As Express Scripts has repeatedly informed Plaintiff's counsel, Mr. Osborne resides in  
19 Orlando, Florida, where he works remotely as Vice President for Pharma and Biotech Trade  
20 Relations for Express Scripts.<sup>2</sup> Mr. Grew resides near Buffalo, New York, where he works remotely  
21 as a Senior Director for Express Scripts. Both witnesses have significant supervisory  
22 responsibilities at Express Scripts that go beyond the matters at issue in this case.

23       On September 26, 2019, Express Scripts responded to Plaintiff's notices, explaining that  
24 neither witness is located in Philadelphia, and that requiring the witnesses to travel to Philadelphia  
25 would subject them to unreasonable annoyance, burden and expense. Pl. Ex. K. On September 30,  
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28 <sup>2</sup> *See, e.g.*, Pl. Ex. F ("As you are aware, Mr. Osborne resides in Orlando, Florida, not Philadelphia, Pennsylvania.").

1 2019, the parties met and conferred regarding Plaintiff's notices. During the meet and confer,  
2 counsel for Express Scripts confirmed that the witnesses would be available on the noticed dates if  
3 the depositions were to take place near where they live and work, but Plaintiff refused to change the  
4 location of the depositions from Philadelphia.

5 On October 3, 2019, Express Scripts filed a motion for a protective order, seeking an order  
6 requiring Mr. Osborne's and Mr. Grew's depositions to be held in or around Orlando, Florida and  
7 Buffalo, New York, respectively. ECF No. 167. Shortly thereafter, Plaintiff filed its motion to  
8 compel, seeking an order requiring the depositions to be held in Philadelphia. ECF No. 169.

## 9 **II. LEGAL STANDARD**

10 "The Court may, on motion, make an appropriate order," including an order to compel, if a  
11 witness fails to appear, or refuses to appear, for a deposition. Pa. R. Civ. P. 4019(a)(1)(iv), (v).  
12 However, such a failure or refusal to appear may be excused on the grounds that the notice is  
13 "objectionable" if the party opposing the notice "has applied for a protective order." Pa. R. Civ. P.  
14 4019(a)(2). "A party . . . from whom deposition is sought" may move for a protective order to  
15 protect itself "from unreasonable annoyance, embarrassment, oppression, burden or expense." Pa.  
16 R. Civ. P. 4012. For good cause, the court may make an order limiting the deposition to "specified  
17 terms and conditions, including a designation of the time and place." *Id.* Protective orders are  
18 appropriate in order to prevent a noticing party from forcing witnesses to travel from other states  
19 and subjecting them to "unreasonable annoyance, burden, and expense." *J.A. Reinhardt & Co. Inc.*  
20 *v. Stettz*, 35 Pa. D. & C. 4th 558, 566 (Pa. Com. Pl. Dec. 13, 1996).

## 21 **III. ARGUMENT**

### 22 **A. Plaintiff's Proposed Deposition Location Would Subject Mr. Osborne and Mr.** 23 **Grew To Unreasonable Annoyance, Burden And Expense**

24 Plaintiff's motion to compel Mr. Osborne and Mr. Grew to appear for deposition in  
25 Philadelphia should be denied. Instead, to avoid unreasonable annoyance, burden and expense, the  
26 Court should enter a protective order requiring the depositions to take place in or near the cities  
27 where the witnesses reside and work—Orlando, Florida and Buffalo, New York.

1 As outlined in Express Scripts' motion for a protective order, ECF No. 167, Mr. Osborne  
2 has significant and wide-ranging responsibilities in his role as Vice President of Pharma and Biotech  
3 Trade Relations at Express Scripts. Forcing Mr. Osborne to travel nearly 1,000 miles from Orlando  
4 to testify in Philadelphia on October 23 would require flights and overnight stays that take him away  
5 from his normal business responsibilities for two or more days. This represents an unreasonable  
6 annoyance, burden, and expense for Mr. Osborne. Likewise, Mr. Grew's responsibilities as a Senior  
7 Director at Express Scripts and his location near Buffalo make it unreasonably annoying,  
8 burdensome, and expensive to require him to travel hundreds of miles and miss two or more days  
9 of work to testify in Philadelphia on October 24th.

10 The burden that conducting these depositions in Philadelphia would impose is particularly  
11 unreasonable in light of the broader Acthar-related litigation in which this case is situated. This is  
12 not a typical case involving parties who are located in Pennsylvania, or even involving an out-of-  
13 state witness. Plaintiff's counsel has filed related litigation with overlapping claims against the same  
14 parties in federal and state courts inside and outside of Pennsylvania, including in Illinois, Maryland,  
15 and Tennessee. Plaintiff's counsel has appeared for hearings, filed motions, and conducted  
16 discovery in these out-of-state jurisdictions, and the parties have agreed to the use and coordination  
17 of discovery and depositions across cases. *City of Rockford v. Mallinckrodt ARD, Inc.*, Civ. No. 17-  
18 cv-50107 (N.D. Ill.), Mar. 15, 2019 Joint Proposed Discovery Plan at 4-5, ECF No. 199 ("To the  
19 extent feasible, the parties will endeavor to ensure that witnesses deposed in the above-captioned  
20 matters will not be deposed a second time in a Related Matter, or vice versa."); *id.* at Sept. 20, 2019  
21 Status Hr'g Tr. at 6, ECF No. 273 (Plaintiff's counsel stating that "we certainly want to coordinate  
22 the effort in Philadelphia with this court"). In fact, discovery in this case already has—and likely  
23 will continue to be—used in cases throughout the United States in forums that Plaintiff's counsel  
24 has purposefully availed itself of in order to bring this case and others. *See* ECF No. 167 at 3. Given  
25 Plaintiff's counsel's choice to file related litigation in multiple other jurisdictions, it is not  
26 unreasonable to ask that Plaintiff's counsel take depositions outside of Pennsylvania. It is far more  
27 reasonable—not to mention less of a burden—for Plaintiff's counsel to take the depositions of Mr.  
28 Osborne and Mr. Grew where they reside or work, rather than for Mr. Osborne and Mr. Grew to

1 travel to Philadelphia and miss several days of work. Courts have found similar burdens to be  
2 unreasonable, warranting a protective order, such as when a party sought to force a Toronto-based  
3 witness to be deposed in Pittsburgh. *Davis v. Pennzoil Co.*, 38 Pa. D. & C. 2d 289, 294 (Pa. Com.  
4 Pl. 1965).

5 **B. Express Scripts Has Not Waived Its Objection To The Location Of Mr.**  
6 **Osborne's Deposition**

7 In its motion, Plaintiff contends that Express Scripts waived any objection to the location of  
8 Mr. Osborne's deposition by failing to appear at the deposition on July 24th, and by "failing to  
9 timely file a Motion for a Protective order, as required by Rule 4012." Pl. Br. ¶¶ 8, 9, 11. Plaintiff  
10 is wrong. On July 18, Plaintiff's counsel *agreed to reschedule the deposition*, obviating the need  
11 for Mr. Osborne to appear on July 24th or for Express Scripts to move for a protective order. *See*  
12 Pl. Ex. D.

13 Plaintiff next contends that Express Scripts waived any objection to the location of Mr.  
14 Osborne's deposition because, in its communications with counsel, it objected to the date but did  
15 not object to the location. Pl. Br. ¶ 11. That is incorrect as well. After receiving the notice setting  
16 Mr. Osborne's deposition for July 24th in Philadelphia, Express Scripts insisted that the parties meet  
17 and confer regarding an appropriate date *and location* for the deposition, explaining:  
18 "Unfortunately [Mr. Osborne] is not available on the unilateral date you proposed. We will,  
19 however, meet and confer with you to find a mutually agreeable *date and location* for Mr. Osborne's  
20 deposition that works for all parties." Pl. Ex. D at 2 (emphasis added). Plaintiff's counsel never  
21 conferred with Express Scripts on the location of the deposition. Instead, he re-noticed the  
22 deposition for Philadelphia without consulting Express Scripts.

23 Finally, Plaintiff claims that Express Scripts *agreed* to hold the deposition in Philadelphia.  
24 Pl. Br. ¶ 41 (claiming that "prior agreement had been reached as to the date and location of the  
25 Osborne deposition"). Specifically, Plaintiff notes that after Express Scripts provided Plaintiff's  
26 counsel with a list of dates on which Mr. Osborne would be available for deposition, Plaintiff's  
27 counsel responded that "'the below [email at Ex. 'G'] does not resolve anything, but a date for Mr.  
28 Osborne's deposition.'" *Id.* ¶ 24 (quoting Pl. Ex. G) (alteration in original). Plaintiff contends that

1 because Express Scripts “never took issue” with his representation that an “agreement had been  
 2 reached as to the Osborne deposition,” it implicitly agreed to hold the deposition in Philadelphia.  
 3 *Id.* But Express Scripts never agreed to hold the deposition in Philadelphia, implicitly or otherwise.  
 4 Plaintiff’s counsel’s email was clear that the only issue that had been ““resolved”” was ““a *date* for  
 5 Mr. Osborne’s deposition.”” *Id.* (quoting Pl. Ex. G). Nothing in any of the communications suggests  
 6 there was an agreement on the *location* of the deposition.

### 7 C. Plaintiff’s Remaining Arguments Are Without Merit

8 Plaintiff accuses Express Scripts of bad faith for failing to schedule Mr. Osborne’s  
 9 deposition around a trip Mr. Osborne took to Philadelphia in July, but this too is without factual  
 10 basis. Specifically, Plaintiff claims it “noticed Mr. Osborne’s deposition for a date [July 24th] when  
 11 it knew Mr. Osborne would be in Philadelphia, as a convenience to the witness . . . .” Pl. Br. ¶ 6.  
 12 As a threshold matter, if the intent was to select a date that was “a convenience to the witness,”  
 13 Plaintiff’s counsel would have been better served to reach out to Express Scripts to find a mutually  
 14 agreeable date and location. Had Plaintiff’s counsel done so, Express Scripts could have explained  
 15 that Mr. Osborne had meetings scheduled in San Francisco for July 23rd and 24th, and was therefore  
 16 unavailable to be deposed in Philadelphia on the 24th, all of which Express Scripts subsequently  
 17 explained in its communications with Plaintiff’s counsel after his unilateral notice of deposition.<sup>3</sup>

18 Having failed to identify any misconduct by Express Scripts, Plaintiff instead attacks  
 19 Express Scripts’ counsel, Quinn Emanuel, a global firm with more than 800 lawyers that handles  
 20 thousands of cases in venues throughout the country. Pl. Br. ¶ 45. Specifically, Plaintiff quotes  
 21 from a completely unrelated case in the Southern District of New York in which the court denied  
 22 the plaintiff’s motion to amend a complaint on the basis that the plaintiff, represented by Quinn  
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24 <sup>3</sup> See Pl. Ex. F (“As you are aware, Mr. Osborne resides in Orlando, Florida, not Philadelphia,  
 25 Pennsylvania. He happened to be in Philadelphia July 22 for what even you concede was an entirely  
 26 ‘unrelated’ professional obligation—namely, the World Congress’ 6th Annual Patient Support  
 27 Services and HUB Design Summit. Mr. Osborne spoke at the first panel, on the first day of the  
 28 conference. It lasted one hour. After that panel concluded, Mr. Osborne headed to the airport,  
 where he boarded a flight to San Francisco for work meetings from Tuesday, July 22 through  
 Thursday, July 24. Mr. Osborne was not, therefore, available for deposition on the date you noticed  
 and counsel for Express Scripts properly notified you of the same.”).



1 Emanuel, had unreasonably delayed in disclosing its intention to amend. (See Pl. Br. ¶¶ 45-47  
2 (citing *In re Interest Rate Swaps Antitrust Litig.*, 2018 U.S. Dist. LEXIS 86732 (S.D.N.Y. May 23,  
3 2018)) (Pl. Ex. N).) None of the lawyers involved in the S.D.N.Y. case has any involvement in this  
4 case.<sup>4</sup> Plaintiff's attack on other Quinn Emanuel attorneys is utterly irrelevant and inflammatory,  
5 and in no way supports Plaintiff's request to force depositions in Philadelphia.

6 \* \* \*

7 In sum, the annoyance, burden, and expense of forcing Mr. Osborne and Mr. Grew to be  
8 deposed in Philadelphia far outweigh any potential harm in requiring Plaintiff to take the depositions  
9 of Mr. Osborne and Mr. Grew in or near the cities where they reside or work. Express Scripts  
10 therefore respectfully requests that the Court deny Plaintiff's motion. Instead, for the related reasons  
11 set forth in Express Scripts' prior motion, ECF No. 167, the Court should enter a Protective Order  
12 requiring Plaintiff to depose Mr. Osborne and Mr. Grew in or near Orlando and Buffalo,  
13 respectively, at a date and time mutually agreed to by the parties. In the alternative, if Mr. Osborne  
14 and Mr. Grew are required to travel to Philadelphia for their depositions, the Court should require  
15 Plaintiff to pay for the expenses they incur. See *Econ Mktg. Inc. v. Side II Assocs. Ltd.*, 17 Pa. D. &  
16 C. 4th 341, 346-47 (Pa. Com. Pl. 1992), *aff'd sub nom. Econ v. Side II Assoc.*, 432 Pa. Super. 695,  
17 635 A.2d 210 (1993) (requiring noticing party to pay for travel expenses of party employee who  
18 lived in Minnesota).

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<sup>4</sup> Counsel's non sequitur attack on defense counsel and their firm does not warrant the dignity  
of a response.



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DATED: October 18, 2019

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